IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18-2-2002

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THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

C.R.P.No.1826 of 2000 and CMP No.9967 of 2000
1.Dr.S.Jayakumar
2.P.Subbiah Gounder .. Petitioners

-vs-

K.Kandasamy Gounder .. Respondent
This civil revision petition is preferred under S.115 of Code of Civil Procedure against the fair and decretal order dated 1
! For Petitioners : Mr.S.Sampathkumar
^ For Respondent : No appearance
: ORDER

This revision has arisen from the order of the learned Subordinate Judge, Udumalpet, dismissing an interlocutory application filed by the petitioners herein for rejection of the plaint in O.S.No.278 of 1999.
2. It was a suit filed by the respondent herein for division of plaint 'A' schedule property into two equal shares and put the plaintiff in possession of one such share and for declaration and possession, apart from mesne profits and appointment of issioner. The instant application has been filed by the petitioners herein seeking for rejection of the plaint filed in the said suit. On contest by the respondent herein, the said application was dismissed by the lower court. The dismissal of the sam e has culminated in this revision.
3. The learned Counsel appearing for the petitioners would submit that the lower court has erred in taking into account the facts that O.S.No.394 of 1990 was filed by the respondent herein for declaration, for partition and for delivery of possessio hat the said suit was dismissed for default on 15.3.1993; that an application in I.A.No.979 of 1993 was filed by the respondent for restoration of the same; that the said suit was ordered to be restored subject to payment of costs of Rs.250/-; that the r espondent did not comply with the said order, and hence, the dismissal of that suit has become final; that suppressing all the above factual aspects, the respondent herein filed the instant suit in O.S.No.278/99; that the lower court failed to observe th at the present suit is filed after a lapse of six years from the date of dismissal of the earlier suit; that the court below failed to note that the proposition put forward by the trial Judge applies only to final decree proceedings in a partition suit a nd not for the institution of the suit itself; and hence, the order of the lower court rejecting the petition has got to be set aside.
4. As could be well seen from the materials available on hand, the respondent herein filed a suit in O.S.394/90 on the file of the Sub Court,

Udumalpet for declaration that he is the absolute owner of plaint 'B' schedule property and for possessio d partition. Written statement and additional written statement were filed by the petitioners herein in that suit. It is not in dispute that the suit in O.S.No.394/90 was dismissed for default on 15.3.1993. It is pertinent to note that the respondent herein filed an application in I.A.No.979/93 for restoration of the said suit, which was allowed subject to payment of Rs.250/- by the respondent towards costs. Since the said conditional order was not complied with by the respondent, the said interlocu tory application was dismissed. At that juncture, the respondent herein filed O.S.No.278 of 1999 for the reliefs, stated supra.

5. At the outset, it has to be necessarily stated that the petitioners herein have filed a civil revision petition before this court in C.R.P.No.682/2000, wherein this court passed an order dated 22.3.2000 as follows:

"The case of the petitioners is that for identical relief there was an earlier suit filed which was dismissed for default, application for setting aside the dismissal was allowed on terms and the terms were not complied with resulting in the earlier missal getting confirmed, that thereafter the present suit has been filed for an identical relief and that the petitioners have filed an application under Order 23 Rule 1(4) of the Code of Civil Procedure praying for rejection of the plaint and the said application is not taken up and given a disposal.

2. It is seen that on 25.1.2000 the application was taken on file and notice ordered on 10.2.2000 and thereafter it was adjourned to 16.2.2000.

3. Having regard to the specific contention raised on behalf of the petitioners, there will be a direction to the lower court to take up the application filed by the petitioners and dispose it of before the end of June, 2000. The civil revision pe on is disposed of accordingly. Consequently, the injunction petition CMP No.3471/2000 is closed."

Subsequent to the filing of the abovesaid revision, the instant application has been filed by the petitioners-defendants under Order 23 Rule 1(4) of C.P.C. for rejection of the plaint in O.S.No.278 of 1999. After the pronouncement of the order in the ab ovesaid C.R.P., the enquiry in the instant application was conducted, and the application was dismissed by the court below.

6. It is seen from the records available on hand that the earlier suit in O.S.No.394 of 1990 was filed on the same cause of action by the same party viz. the respondent/plaintiff, which was dismissed for default. On application, the said dismissal he suit was set aside by a conditional order, as stated supra. It has to be mentioned here that due to the non-compliance of the said conditional order, the judgment of the trial court in O.S.No.394/90 dismissing the suit for default, has become final. It is pertinent to note that the said judgment was not appealed against. The proceedings in OS No.394/90 had taken place six years back. Subsequently, on the same cause of action, the respondent/plaintiff has come forward with the instant suit in O.S. 278/99 under Order 7 Rule 1 C.P.C. It is pertinent to note that the respondent herein filed the earlier suit in OS 394/90 against the petitioners herein and others seeking for a decree; a) declaring the plaintiff's title to the suit plaint "B" schedule property and directing the fourth defendant to deliver possession of the suit schedule property to the plaintiff; b) partitioning the "A" Schedule property into 3 equal shares,

allotting and giving separate possession of one such share to the plaintiff; and c) restraining the 4th defendant permanently from delivering the possession of the suit property to the defendants 1 to 3, while he filed the latter suit in OS No.278 of 1999 against the petitioners herein and others praying for a decree; a) for divi sion of plaint "A" Schedule property into 2 equal shares and put the plaintiff in possession of one such share; b) declaring the right and title of the plaintiff to plaint "B" schedule property and for possession thereof; c) granting mesne profits from t he date of suit till delivery of possession; and d) appointing commissioner to effect division of property. It is also pertinent to point out that the cause of action for the earlier suit arose on 22.4.1958 the date of settlement of the plaint "B" Sched ule property, and on the same date when the plaintiff accepted the settlement deed, while the cause of action for the latter suit arose on 22.4.58 when the settlement was executed. As could be seen from the records available on hand, the properties desc ribed in "A" and "B" Schedule in both the suits are one and the same. Thus, it would be very clear that both the suits have been filed seeking the reliefs as stated supra in respect of the very same subject matter in dispute.

7. It would be more advantageous to reproduce Order 23, Rule 1(4) of Code of Civil Procedure, which runs as follows:

"R.1 Withdrawal of suit or abandonment of part of claim:- (1) At any time after the institution of a suit, the plaintiff may, as against all or any of the defendants, abandon his suit or abandon a part of his claim:.....

(4) Where the plaintiff-

(a)abandons any suit or part of claim under sub-rule (1), or

(b)withdraws from a suit or part of

a claim without the permission referred to in sub-rule(3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

8. Order 9 Rule 9 of Code of Civil Procedure runs as follows:

"9.(S.103): Decree against plaintiff by default bars fresh suit: (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an ord er to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwis e as it thinks fit, and shall appoint a day for proceeding with the suit."

9. The learned counsel for the petitioner much relying on the two decisions of this Court reported in 1) 1998(II) CTC 474 (HINDUSTAN PHOTO FILMS MANUFACTURING CO. LTD. VS. R.LAKSHMANAN) and 2) 1999(I) CTC 600 (RAMIAH ASARI VS. TMT.KURSHAD BEGAUM AND THER), would submit that the second suit filed by the respondent on the same cause of action was barred and the second suit has to be struck off, and under such circumstances, this Court has to invoke its superintending power under Article 227 of the Con stitution of India for striking off the suit. In both the above cited decisions, His Lordship S.S.Subramani, J, as he then was, has held as follows:

1998 (II) CTC 474:

"Code of Civil Procedure, 1908, Order 2, Rule 2 Bar of second suit on same cause of action Plaintiff filing first suit for declaration of his age and

for consequential correction in service record Plaintiff not filing any application for injunction Plaintiff filing Transfer Petition to transfer said suit to Sub-Court Transfer Petition dismissed Plaintiff filing second suit before Sub-Court for permanent injunction restraining defendant from superannuating him pending disposal of first suit Second suit is not maintainable as first suit on same cause of action is pending in earlier suit Second suit to be struck off.
Constitution of India, Article 227 Superintending power of High Court Exercise of - Striking off suit When two suits are filed on same set of facts based on same cause of action Later suit is struck off Plaintiff filed OS No.286 of 1997 to decl are date of birth as 1.9.1940 and to alter the same in service records Subsequently O.S.37 of 98 is filed for permanent injunction not to superannuate and discharge plaintiff from service pending O.S.No.286 of 1997 Trial court granted exparte injunct ion in O.S.No.37 of 98 Delay in disposing of vacate injunction application Later suit in O.S.No.37 of 98 itself is struck off as abuse of process of court."
1999(I) CTC 600:
"Code of Civil Procedure 1908, Section 151 Inherent powers of court to strike out pleading which is in abuse of process amounts When to be exercised Suit for permanent prohibitory injunction restraining defendants from interfering with peaceful pos session and enjoyment of property Interim injunction application dismissed and appeal also dismissed Revision also dismissed at admission stage Another suit filed subsequently by plaintiff on file of same Court by adding certain other properties Tamil Nadu Housing Board is in possession as owners of such properties Plaintiff claiming no relief against Housing Board but only against 7th defendant When earlier litigation is already pending another suit cannot be filed even though one more Surv ey Number is added which will not give new right to plaintiffs when property is same Plaintiff cannot file a suit in which they have no interest Court should invoke its inherent power too strike off plaint when it comes to conclusion that claim has b een made only for collateral purpose or is spurious one or of frivolous nature or improper use of machinery of court or its continued prosecution results in vexatious litigation."
10. From the abovesaid decisions, it would be abundantly clear that when the second suit is filed on the same cause of action, this Court invoking the superintending power vested under Article 227 of the Constitution of India could well strike off latter suit. Needless to say, as stated above, in both the suits, the properties, the causes of action for filing the suit, the reliefs as asked for and the parties are one and the same.
11. At this juncture, it remains to be stated that a comparison of the averments and the reliefs as asked for in both the plaints would reveal that the plaintiff in both the suit has sought for the relief of partition. This court had an occasion to sider the question whether when a prior suit for partition dismissed for default and when no decision on merits was taken, the second partition suit is barred by res-judicata, in a case reported in 1993 (1) MLJ 60 (BALIAH NADAR AND ANOTHER VS. RAYAPPAN A ND OTHERS), and this Court has held that the second suit was maintainable, though the first suit was dismissed for default in the first occasion, in view of the continuing cause of action for the relief of partition. True it is, in the instant case also , there was a relief of partition sought for in the first suit, and while the same was dismissed for default, the second suit has been filed for the

same relief of partition. But the earlier decision of this Court has got to be distinguished from the pr esent facts of the case. It was a case, which was merely dismissed for default, but a second suit was filed on the same cause of action for partition. In the instant case, the first suit was dismissed for default, and when an application for restoratio n was filed, it was allowed on condition of payment of costs within the stipulated time. But the plaintiff has miserably failed to perform the said condition. Under such circumstances, though one of the reliefs sought for was for partition, the failure to comply with the condition imposed by the court below for restoration of the former suit has made the proceedings to come to an end. Hence, no question of filing the second second on the same cause of action would arise.

12. From all the discussions made above, it would be clear that the respondent/plaintiff having filed the former suit, and on dismissal of the same, having made an application for restoration, and the restoration application having been allowed on p nt of costs, and despite sufficient opportunity, the plaintiff having failed to perform that part of the condition, the filing of the latter suit on the same cause of action in respect of the same property, was nothing but an improper use of the machiner y of court. Thus, the court is of the view that it is a fit and proper case to invoke its superintending power vested under Article 227 of the Constitution to strike off the plaint in O.S.No.278 of 1999 filed by the respondent herein. Therefore, the or der of the court below is liable to be dismissed.

13. In the result, this civil revision petition is allowed, setting aside the order of the lower court. I.A.No.168 of 2000 is allowed. There shall be no order as to the costs. Consequently, connected CMP is closed.

Index: yes/no 18-2-2002

nsv/
To:

The Subordinate Judge,
Udumalpet.
M.CHOCKALINGAM, J.
Pre delivery order in
C.R.P.No.1826 of 2000
and
CMP No.9967 of 2000

Dt: 18-2-2002